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Sumner J. Hatch and Robert M. Mcrae v. Sugarhouse, Finance Company, A Utah Corporation : Respondent's Brief

IN THE SUPREME CO
of the
STATE OF UT

SUMNER J. HATCH and
ROBERT M. McRAE,
Plaintiffs

vs.

SUGARHOUSE FINA
a Utah corporation,

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INDEX

CASES CITED

TEXTS CITED

IN THE SUPREME COURT

of the

STATE OF UTAH

SUMNER J. HATCH and ROBERT M. McRAE, *Plaintiffs-Respondents,* - vs. - SUGARHOUSE FINANCE COMPANY, a Utah corporation, *Defendant-Appellant.*	Case No. 10807

RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to collect attorneys' fees for services rendered by plaintiffs-respondents.

DISPOSITION IN LOWER COURT

The Third District Court of Salt Lake County, State of Utah, the Honorable Stewart M. Hanson presiding,

having heard arguments of both counsel at the hearing on plaintiffs' motion for summary judgment and taking the matter under advisement, granted said motion, and on the 12th day of December, 1966, entered its summary judgment in favor of plaintiffs in the total sum of $8,740.15, with interest thereon at the rate of 8% from said date until paid.

RELIEF SOUGHT FROM THIS COURT

Plaintiffs-respondents seek a decision from this court affirming the judgment of the lower court.

STATEMENT OF FACTS

Defendant filed an answer generally admitting the employment of plaintiffs (R. 5). Defendant's brief before this court, at page 3, admits liability for certain litigation expenses incurred in the sum of $980.10, and certain appearance charges before the Salt Lake County Grand Jury impaneled in 1965, in the sum of $250.00. The fair import of its counter-affidavit to respondents' motion for summary judgment (R. 25-28) acknowledges the only remaining issue is the amount of defendant's liability to plaintiffs for the claimed sum of $6,100.00 charged at an hourly rate of $25.00 per hour and the sum of $2,000.00 as billed for additional services rendered, for which no time charges were kept, together with interest on all of the above amounts (Appellant's brief, pages 3 and 4).

The affirmative defenses set up by appellant are as follows:

(a) An alleged fee contract between Sugarhouse and McRae,

(b) An allegation of unwarranted and unauthorized services by plaintiff McRae, and

(c) Services being billed by McRae at a rate in excess of their reasonable value because of his training and experience (billing rate, $25.00 per hour) (R. 5-6).

To these affirmative defenses, a reply was filed denying their authenticity (R. 8) thereby placing defendant on its proof. An interrogatory was served upon defendant seeking to ascertain what contractual relationship was relying on in its first defense (sub (a) above) (R. 11). It was answered, admitting that a contract existed between plaintiff McRae and Neuman C. Petty, as an individual, the same being a personal retainer agreement (Attachment to R. 7).

Thereafter, plaintiffs prepared an affidavit in support of their cause of action, detailing the efforts expended on behalf of defendant, substantiating in writing and swearing to the 244 hours of recorded time spent by plaintiff McRae during the few months in question, and stated that the sum of $2,000.00 was a fair and reasonable sum due plaintiffs for the miscellaneous services rendered by them for "numerous telephone calls, evening

appointments, Saturdays, Sundays, and holidays worked" (R. 21) (the fair and reasonable value of services rendered, considering the demands made by defendant, and unrecorded time).

Defendant-appellant filed a counter-affidavit. The matter was heard on a motion for summary judgment, which motion was granted. Respondents were awarded a judgment in accordance with the prayer of their complaint, together with interest and costs.

POINT ON APPEAL

NO GENUINE ISSUE OF FACT REMAINS FOR TRIAL AND, THEREFORE, THE GRANTING OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT WAS PROPER AS A MATTER OF LAW.

Defendant attempted to avoid the remaining issue in all stages of the District Court proceedings. It filed general allegations in the form of denials to plaintiffs' complaint, failed with reasonable certainty to respond to plaintiffs' discovery device, and also in its counter-affidavit failed to specify one fact which the court could fairly label an issue.

In an attempt to ascertain what contract appellant was relying on between plaintiff McRae and defendant, the contents of the same were sought by interrogatory (R. 18 and 19), but no terms or conditions were forthcoming in response to that interrogatory. Nowhere in defendant's counter-affidavit is there a denial of the

minimum of 244 hours affiant spent on defendant's business in attempting to recoup some $400,000.00 of misappropriated funds of defendant. Nowhere in the counter-affidavit is there any competent evidence from appellant's counsel or another attorney by affidavit either that the rate of $25.00 per hour is an unreasonable rate or non-prevailing rate for services rendered by attorneys of this county on an hourly basis, and nowhere in defendant's answer to plaintiffs' complaint is there ever an issue raised as to the failure of plaintiffs to supply the defendant with an explanation or itemization for the $6,100.00 claimed ($25.00 per hour x 244 hours), an issue raised for the time in paragraph 7 of its counter-affidavit. Further, nowhere in the pleadings is there evidence of any intention of the parties hereto, even by implication, to be bound by any other fee schedule than the prevailing minimum rate of attorneys practicing in Salt Lake County. Also, there is no counter-affidavit of any attorney licensed to practice law in the State of Utah that $2,000.00 for miscellaneous services rendered, in addition to recorded time, as generally described above, is unreasonable.

In the Utah State Bar Advisory Handbook on Office Management and Fees published and distributed by the Utah State Bar Association under the Section entitled "Fee Schedule" at page 17, a recap of Canons of Ethics of the American Bar Association Canon No. 12 is set forth as follows:

"In determining the amount of a fee, it is proper

> to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed or will involve the loss of other employment while employed in the particular case or antagonism with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service."

The propriety of evaluating services rendered under this criterion has at no time been disputed.

In *7 Am. Jur. 2d*, Section 268, entitled "Attorneys at Law" is found the following:

> "The testimony of duly qualified witnesses, given as expert opinion evidence, is admissible on the issue of the value of the services of an attorney. Generally the testimony of expert witnesses is not essential, but at times a fair and reasonable compensation for the professional services of a lawyer can only be ascertained by the opinion of members of the bar who have become familiar by experience and practice with the character of such services. Practicing lawyers have been held

> to occupy the position of experts on questions of this nature.
>
> "An attorney, as a witness, may give his opinion of the value of the services rendered, either from his own knowledge or from the nature and extent of the services as testified to by other witnesses or by the plaintiff himself."

The case of *Startin v. Madsen,* 120 Utah 631, 237 P.2d 834, held that an attorney was a competent witness to testify to the reasonableness of his services. No affidavit exists against the proposition that charges may be made in cases involving the magnitude of this employment, for the value of services rendered, and also giving consideration to the demands of a client as the same impairs the orderly operation of office functioning and other professional employment by necessitating work on evenings, Saturdays, Sundays, holidays, and numerous telephone calls. It would appear, therefore, since no denial of recorded hours spent is in the record, this evidence must be accepted as uncontroverted, both as to amount and value.

By counter-affidavit, appellant sought by general denials to dispute the $2,000.00 claimed obligation. This was done without factual basis or statement of inability to supply the same. The attempted result was to impose upon plaintiffs delay in recovery of an obligation rightfully due them.

Utah Rules of Civil Procedure, Rule 56(e) states:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleading, but his response by affidavits or otherwise as provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If he does not further respond, summary judgment, if appropriate, shall be entered against him."

The appellant has not met its burden under this rule.

Since the court itself is an expert on the question of the value of legal services, it can determine for itself the fair and reasonable value of services rendered by plaintiffs in attempting to recoup $400,000.00 in misappropriated funds. See *FMA Financial Corp. v. Build Inc.*, 17 Utah 2d 80, 404 P.2d 670. In that case it was ruled that the Judge may fix the amount of attorney's fees on the basis of his own knowledge or experience and/or in connection with reference to an approved bar schedule. In *29 Am. Jur. 2d*, "Evidence," page 93, is found the following statement:

> ". . . where the plaintiff refers to another proceeding or judgment, and specifically bases his right of action, in whole or in part, on something which appears in the record of the prior case, the court, in passing on a demurrer to the complaint, may take judicial notice of the matters appearing in the former case."

It would seem under this rule that a Judge could take judicial notice of the files and records of cases in

his court, being the subject matter of plaintiffs' action against appellant, and the fact that five civil actions were commenced by respondents on behalf of appellant in the Salt Lake County District Court against multiple defendants; that in three of these actions appearances were made by appellant's counsel without any substitution of counsel or notice to plaintiffs herein; that subsequently one of the persons who misappropriated appellant's funds has been committed to the Utah State Prison for his actions under an indictment of the Salt Lake County Grand Jury; and that respondents' actions, because of the discovery pertaining to the above five civil actions, helped create a foundation for civil actions now pending against three large Salt Lake banking institutions in another attempt to recoup some of the misappropriated funds, all without reference to Canon No. 7 of the Canons of Ethics of the American Bar Association and 78-51-34, Utah Code Annotated 1953, which protects respondents from client actions such as this.

Plaintiffs having served upon defendant interrogatories and requests for admissions of fact, and the defendant having failed to indulge in any discovery, it would, therefore, appear that the foregoing provisions of Rule 56 (e) would be sufficient as a matter of law to support the summary judgment since plaintiffs, as the moving party, have provided the lower court with evidentiary material "in itself sufficient and the opposing party failed to proffer any evidentiary material when it is presumably in a position to do so . . ." *Dupler v.*

Yates, 10 Utah 2d 251, 269, 351 P.2d 624 (1960).

This record is void of any legal reason why the court erred in granting of the summary judgment as it was "justified in concluding that no genuine issue of fact is present, nor would one be present at trial." *Dupler v. Yates*, supra. Under the rule in the Dupler case, plaintiffs have established their right of recovery without contest and likewise established by competent evidence, as follows:

(1) The reasonable charge to be made for services rendered of this nature, and

(2) The quantum of these services, and are entitled to relief from a dilatory debtor client.

The judgment is supported by appellant's failure, as follows:

(1) By any discovery device either before or after the filing of plaintiffs' motion for summary judgment, to controvert the above values by competent evidence,

(2) To deny the truthfulness of plaintiffs' affidavit and proffer facts showing a genuine issue,

(3) To proffer evidence by the remotest application of the parole evidence rule to attempt to utilize provisions of a private employment contract between one of the plaintiffs and an officer of the defendant corporation, in his individual capacity, which contract contained

several fringe benefit provisions over and above cash compensation.

(4) To specify one act by plaintiffs that was not performed at the special insistence and request of defendant, thereby creating an issue of fact.

The pleadings in this case, together with the extraneous facts not contained in the record on appeal, but utilized by appellant in its statement of facts, tend to indicate the true nature of appellant's attitude in these proceedings. It should be noted that originally defendant admitted little if any knowledge concerning plaintiffs' representation of defendant before the Grand Jury, but subsequently confessed liability (R. 25, paragraph 3, and appellant's statement of facts, page 3). Likewise, defendant generally argues against the expenses incurred and advanced by plaintiffs (R. 26, paragraph 4, and appellant's brief, page 3), but confesses liability. Since nowhere in these pleadings has defendant sought by any discovery device to controvert the sworn affidavit of plaintiffs, but has merely elected to stand on generalities of "no information," "lack of reasonableness," or "defendant questions," rather than get to the meat of its contentions, and the substance of its defense (assuming one exists), and pay its just due obligations, plaintiffs should be sustained on appeal.

Appellants attempt to rely on a tender of $4,990.10, together with a payment of $1,000.00 on December 9, 1965, as evidence of fair and reasonable compensation for services rendered and reimbursement for expenses advanced. No contest is raised for $980.10 of expenses and $250.00 for Grand Jury appearance fees. After deducting these amounts from the payment and tender, the balance applicable to fee is $4,760.00. The record is void as to how this sum is calculated, what is considered in formulating same, i.e., what hourly rate, what value is attributed to the immediate and vast work performed at the demand of defendant, what consideration was given plaintiffs for their services in laying groundwork for actions against banking institutions, or what compensation was due them for being surreptitiously substituted as counsel in pending actions. With these considerations, with the Court's own ability to assess values of services, and considering the absence of a genuine issue as raised from any pleading filed by defendant, plaintiffs submit it was well within the province of the District Court to evaluate plaintiffs' claim and approve it. Likewise, it is within the province of this Court to review the evidence and assess the reasonableness of the fee charged and approve the amount.

CONCLUSION

The Honorable Stewart M. Hanson correctly evaluated the pleadings and records of the Court, and properly

granted plaintiffs' motion for summary judgment based on the only available evidence as to the reasonable value of the services of plaintiffs-respondents herein.

Respectfully submitted,

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